BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY G. STARK	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,898
MONFORT, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent requested Appeals Board review of the Award entered by Administrative Law Judge Nelsonna Potts Barnes on April 29, 1997.

APPEARANCES

Claimant appeared by and through his attorney, David H. Farris of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Stephen J. Jones of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

Respondent asked for Appeals Board review of the Administrative Law Judge's findings and conclusions in regard to the following issues:

(1) The nature and extent of claimant's disability.

(2) Whether the claimant was entitled to unauthorized medical expense benefit as provided by K.S.A. 44-510(c)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

The Administrative Law Judge awarded claimant permanent partial disability benefits based on the stipulated 7 percent permanent functional impairment rating from February 1, 1996, through April 15, 1996. Thereafter, the Administrative Law Judge found claimant entitled to a 91 percent work disability. Respondent questions claimant's eligibility for a work disability and if eligible then the respondent argues the record proves the claimant is entitled to only 76 percent rather than a 91 percent work disability. For the following reasons more fully developed below, the Appeals Board concludes that the Administrative Law Judge's work disability award should be modified.

(1) Claimant sustained an injury to his low back on December 11, 1995, while performing his regular work duties for the respondent. The respondent provided medical treatment for claimant's low back injury, first with the company physician, Ralph E. Bellar, M.D., in Harper, Kansas, and then with Robert L. Eyster, M.D., an orthopedic surgeon located in Wichita, Kansas.

Claimant first saw Dr. Eyster on January 17, 1996. Dr. Eyster had claimant undergo an MRI examination that showed claimant with degenerative disc disease at three levels and a small central focal disc protrusion at L5-S1. Dr. Eyster provided claimant with conservative medical treatment consisting of anti-inflammatory medication, cortisone injections, traction, physical therapy, and exercises. Dr. Eyster opined that claimant's back injury was not the type that would benefit from surgical intervention. The doctor followed claimant until he met maximum medical improvement on July 17, 1996. Claimant was then released with temporary restrictions and a 7 percent permanent functional impairment rating. Dr. Eyster last saw claimant on December 11, 1996. At that time, Dr. Eyster placed permanent restrictions on claimant's activities that limited him to a single lift of 50 pounds, repetitive lift of no more than 25 pounds, no excessive bending or twisting over eight times per hour, and no prolonged sitting.

Claimant was paid seven weeks of temporary total disability compensation by the respondent between the date of his injury, December 11, 1995, and April 15, 1996, claimant's last day worked. On April 15, 1996, respondent closed the plant in Harper, Kansas, where claimant was employed as a laborer.

The record indicates that claimant was returned to work while he was under Dr. Eyster's treatment sometime in February 1996. Dr. Eyster placed temporary

restrictions on claimant of no lifting over five pounds and no bending. Respondent accommodated claimant in a light-duty job at a comparable wage until the plant closed.

Following the plant closing, respondent offered claimant a job at a comparable wage within his restrictions at the respondent's Greeley, Colorado, plant. Claimant had been a long-time resident of Kingman, Kansas, with strong family ties to the area and declined the transfer offer of the respondent.

At the time of the regular hearing, held on January 6, 1997, claimant remained unemployed. However, claimant testified and submitted documented evidence of actively seeking employment in the Kingman, Kansas, area. The respondent argues since claimant was offered a job within his restrictions at a comparable wage that claimant is limited to an award based on functional impairment and, therefore, claimant is not eligible for a higher work disability award. *See* K.S.A. 44-510e(a).

The Appeals Board disagrees with respondent's argument and finds claimant was not required to move his residence to Greeley, Colorado, to accept a job offer from respondent. Although decided under the prior definition of work disability contained in K.S.A. 1991 Supp. 44-510e(a), the Court of Appeals found in the case of Scharfe v. Kansas State Univ., 18 Kan. App. 2d 103, 108, 848 P.2d 994, *rev. denied* 252 Kan. 1093 (1992), that following an injury workers are not required to move their residences or travel unreasonable distances to obtain employment. Therefore, the Appeals Board concludes claimant was eligible for work disability following the closing of the respondent's plant on April 15, 1996. *See* Lee v. Boeing Military Airplanes, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

Claimant was interviewed by vocational expert, Jerry D. Hardin, on October 28, 1996, for the purpose of developing a work task performance assessment. Mr. Hardin had Dr. Eyster's medical report dated July 17, 1996, and the medical report dated September 24, 1996, of Blake C. Veenis, M.D. Dr. Veenis examined and evaluated the claimant at the request of claimant's attorney on August 19, 1996. Both of these reports contain restrictions placed on claimant by the physicians following claimant's work-related accident. Unfortunately, the report Mr. Hardin utilized from Dr. Eyster contained only temporary restrictions. Mr. Hardin, therefore, did not express an opinion based on Dr. Eyster's permanent restrictions. Utilizing Dr. Veenis' permanent restrictions, Mr. Hardin opined that claimant had lost the ability to perform 71 percent of the work tasks he had performed in the 15 years next preceding his date of injury. *See* K.S.A. 44-510e(a). Mr. Hardin also formulated claimant's work task loss on a time-weighted analysis that resulted in an 81 percent work task loss.

Dr. Veenis testified by deposition and as required by K.S.A. 44-510e(a) expressed his opinion on claimant's loss of ability to perform work tasks. Dr. Veenis acknowledged he had reviewed Mr. Hardin's work task analysis and generally agreed with Mr. Hardin's conclusion, except Dr. Veenis testified that in his opinion claimant retained the ability

post-injury to perform the work task of taping off areas that he performed when he was working as a roofer-painter. Therefore, making this adjustment, Dr. Veenis opined that as a result of claimant's work-related low back injury claimant had a 69 percent work task loss and a time-weighted work task loss of 81 percent.

The respondent retained vocational expert, Karen Terrill, for the purpose of formulating an assessment of claimant's work task loss. Ms. Terrill interviewed claimant on November 21, 1996, and issued her report on January 27, 1997. Ms. Terrill had Dr. Veenis' medical report dated September 24, 1996, and Dr. Eyster's medical report dated December 17, 1996. These reports contained the doctors' opinion on claimant's permanent restrictions. Ms. Terrill opined, during her deposition testimony, that claimant had a 41 percent work task loss utilizing Dr. Veenis' permanent restrictions and a 34 percent work task loss utilizing Dr. Eyster's permanent restrictions. Ms. Terrill did not express an opinion based on a time-weighted work task loss.

Dr. Eyster reviewed Ms. Terrill's report and agreed with her assessment that claimant had a 34 percent work task loss as a result of his work-related low back injury. On cross-examination, Dr. Eyster acknowledged that the permanent restrictions he placed on the claimant, that were contained in his December 17, 1996, report and utilized by Ms. Terrill, should also include the restriction of no prolonged sitting. However, Dr. Eyster opined that this additional restriction would not change his opinion that claimant's work task performing ability had been reduced by 34 percent.

The Administrative Law Judge found Dr. Veenis' opinion that claimant had a 81 percent loss of ability to perform work tasks based on the time-weighted analysis of Mr. Hardin as the most persuasive evidence in the record on this component of the work disability test contained in K.S.A. 44-510e(a). The wage loss component of the disability test was found to be 100 percent as the claimant was not employed at the time of the regular hearing. As required by K.S.A. 44-510e(a), the Administrative Law Judge then averaged these two components together finding claimant's work disability to be 91 percent. The Administrative Law Judge did not consider Dr. Eyster's opinion on claimant's work task loss.

The Appeals Board finds that Dr. Eyster's opinion, based on Ms. Terrill's work task loss assessment report, is persuasive and should be considered. Ms. Terrill does not, however, time weight the tasks. The Appeals Board concludes that since both physicians' work task loss opinions are persuasive, their opinions, based on the non-time-weighted analysis of the vocational experts, should be utilized in determining claimant's appropriate work task loss percentage. The Appeals Board, therefore, finds that Dr. Eyster's 34 percent opinion should be equally weighed with Dr. Veenis' 69 percent opinion resulting in a work task loss of 52 percent.

Averaging this 52 percent work task loss with claimant's 100 percent wage loss, the Appeals Board concludes claimant is entitled to a work disability award of 76 percent. *See* K.S.A. 44-510e(a).

(2) The respondent argues the claimant is not entitled to the unauthorized medical expense provided up to $500 as set forth in K.S.A. 44-510(c)(2). Claimant is requesting the $500 unauthorized medical expense for the cost of the examination and report of Dr. Veenis.

K.S.A. 44-510(c)(2) allows the employee to choose a health-care provider for examination, diagnosis, and treatment and the employer is obligated to pay the fees and charges of such health-care provider up to the statutory maximum of $500. However, examination, diagnosis, and treatment shall not be used to obtain a functional impairment rating.

Although the claimant did not obtain a functional impairment rating from Dr. Veenis, the respondent argues that the purpose Dr. Veenis' examination was only for an opinion on permanent restrictions and not for the purpose of examination, diagnosis, or treatment.

The Appeals Board has previously had an opportunity to address this issue. In Funk v. Sunflower Training Center, Docket No. 189,244 (May 1996), the Appeals Board found that K.S.A. 44-510(c)(2) specifically prohibits the use of the unauthorized medical expense for the purpose of obtaining a functional impairment rating. However, the statute does not prohibit the unauthorized medical allowance to be used to obtain restrictions against future physical activities, nor does it specifically prohibit an opinion from a physician regarding a claimant's loss of ability to perform work tasks performed during the 15 years preceding the claimant's accident. Therefore, the Appeals Board affirms the Administrative Law Judge's conclusion that claimant was entitled to the unauthorized medical expense contained in K.S.A. 44-510(c)(2) up to the statutory maximum of $500.

All other findings and conclusions of the Administrative Law Judge in the Award that are not inconsistent with the findings and conclusions in this Order are adopted by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated April 29, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Larry G. Stark,

and against the respondent, Monfort, Inc, a qualified self-insured, for an accidental injury which occurred December 11, 1995, and based upon an average weekly wage of $353.51.

Claimant is entitled to 7 weeks of temporary total disability compensation at the rate of $235.69 per week or $1,649.83, followed by 11 weeks of permanent partial disability compensation at $235.69 per week or $2,592.59 for a 7% functional disability through April 15, 1996, and 304.40 weeks of permanent partial disability benefits at $235.69 per week or $71,744.03 for a 76% permanent partial work disability, for a total award of $75,986.45.

As of August 31, 1997, there is due and owing claimant 7 weeks of temporary total disability compensation at the rate of $235.69 per week or $1,649.83, followed by 11 weeks of permanent partial disability benefits at the rate of $235.69 per week in the sum of $2,592.59 for a 7% functional disability and 71.86 weeks of permanent partial disability benefits at $235.69 per week or $16,936.68 for a total of $21,179.10, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $54,807.35 is to be paid for 232.54 weeks at the rate of $235.69 per week, until fully paid or further order of the Director.

All other orders entered by the Administrative Law Judge in the Award dated April 29, 1997, are approved and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
Stephen J. Jones, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director